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In The

Supreme Court of the United States

October Term, 1984

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., and NORMAN GELLMAN individually and doing business as SOUTHMOST MACHINERY CORP.,

Petitioners,

vs.

SEVILLE INDUSTRIAL MACHINERY CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Must a plaintiff alleging a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 (1982) *et seq.* properly plead the elements of an enterprise under 18 U.S.C. §1961?

2. Must a plaintiff alleging a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 (1982) *et seq.* properly plead racketeering injury?

3. Must a plaintiff alleging a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 (1982) *et seq.* allege that the defendants have been convicted under the Act's criminal provisions?

4. Does a complaint sounding essentially in breach of contract and fraud state a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 (1982) *et seq.?*

PARTIES TO THE PROCEEDING BELOW

Appellees in the proceeding below included petitioners Norman Gellman, a resident of Texas, Southmost Machinery Corp., a Texas corporation, and Tri-State Machinery Corp., a New Jersey corporation. Defendant Paolo Alfieri, a resident of Texas, was not involved in the proceeding below.

Appellant in the proceeding below was respondent Seville Industrial Machinery Corp., a New Jersey corporation.

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No.

In The

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October Term, 1984

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., and NORMAN GELLMAN individually and doing business as SOUTHMOST MACHINERY CORP.,

Petitioners,

vs.

SEVILLE INDUSTRIAL MACHINERY CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

The panel opinion of the United States Court of Appeals for the Third Circuit is reported at 742 F. 2d 786 (3rd Cir. 1984) and is included in the Appendix (3a). The order denying rehearing in banc is included in the Appendix (1a). The opinion of the United States District Court for the District of New Jersey is reported at 567 F. Supp. 1146 (D.N.J. 1983) and is included in the Appendix (15a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 6, 1984. A timely petition for rehearing in banc was denied on October 3, 1984. The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved in this petition is the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 (1982) *et seq.*, which is reproduced in the Appendix (50a).

STATEMENT OF THE CASE

A. Nature of the Case

Respondent Seville Industrial Machinery Corp. ("Seville"), in a complaint filed in the United States District Court for the District of New Jersey on January 14, 1983, alleged various claims against petitioners Norman Gellman ("Gellman"), Tri-State Machinery Corp. ("Tri-State"), Southmost Machinery Corp. ("Southmost"), and against Paolo Alfieri ("Alfieri"), which arose out of transactions in the sale, consignment, and shipment of industrial equipment.

Seville claimed that it has been injured by the fraud (Second Count), breach of contract (Third Count), conversion (Fourth Count), and tortious conduct (Fifth Count) of petitioners and Alfieri. Additionally, Seville alleged violations by those parties of the substantive and conspiracy provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §1961 (1982) *et seq.* ("RICO") (First Count). Seville sought treble

damages under §1964(c), which affords that remedy to "any person injured in his business or property by reason of a violation of section 1962," which prohibits conducting the affairs of an "enterprise"[1] through a "pattern of racketeering activity."[2]

B. Course of Proceedings

Petitioners Gellman, Tri-State and Southmost[3] filed a motion on or about April 20, 1983 seeking an order dismissing the complaint pursuant to Fed. R. Civ. P. 9(b), 12(b)(1) and 12(b)(6), or in the alternative, requiring a more definite statement pursuant to Fed. R. Civ. P. 12(e). The motion was heard before the Hon. Dickinson R. Debevoise, U.S.D.J., on June 13, 1983. In an order entered on July 8, 1983, Judge Debevoise dismissed the complaint in its entirety. In an opinion of even date [reported as *Seville Industrial Machinery Corp. v. Southmost Machinery Corp., et al.*, 567 F. Supp. 1146 (D.N.J. 1983)], the District Court detailed the numerous deficiencies which required dismissal of the First Count, or RICO claim:

(1) the failure to properly plead the "enterprise" element of the RICO claim by inconsistently alleging one or four enterprises, by identifying defendants as enterprises, and by failing to demonstrate the structure or purpose of any enterprise (567 F. Supp. at 1150-1154);

---

1. An enterprise includes, *inter alia*, any individual, association, or other legal entity, or group of individuals associated in fact. 18 U.S.C. §1961(4).

2. A pattern of racketeering activity encompasses two or more predicate racketeering acts. 18 U.S.C. §1961(5).

3. Defendant Alfieri has separate counsel and was not a party to the proceeding below.

(2) the failure to properly plead the elements of the predicate acts comprising the pattern of racketeering activity by omitting requisite elements of the offenses and the time, place, and content details of the fraud components of those offenses (*id.* at 1155-1156);

(3) the failure to properly plead the conspiracy to violate RICO by omitting any allegation of agreement to commit a substantive RICO violation (*id.* at 1154-1155).

The Second through Fifth Counts were dismissed for lack of pendent jurisdiction since they asserted state law claims.

Seville filed a notice of appeal on August 1, 1983.

Petitioners urged the United States Court of Appeals for the Third Circuit to affirm the dismissal not only on the grounds cited by the District Court but also because Seville had failed to allege racketeering injury and because his claim of garden variety business fraud was beyond the scope of RICO. In a supplemental letter brief submitted pursuant to Fed. R. App. P. 28(j), petitioners brought to the attention of the Third Circuit the case of *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F. 2d 482 (2nd Cir. 1984). In *Sedima*, the Second Circuit affirmed dismissal of a complaint asserting a RICO claim because the complaint failed to allege both prior convictions of the RICO predicate offenses and racketeering injury.

In an opinion filed on September 6, 1984 and reported at 742 F. 2d 786 (3rd Cir. 1984), a panel of the Third Circuit consisting of Judges Gibbons, Hunter and Rambo reversed the judgment of the District Court in part, affirmed in part and remanded for further proceedings. The panel reversed dismissal of the First Count on several grounds: (a) Seville sufficiently identified the enterprises engaged in RICO violations; (b) Seville

pleaded with sufficient particularity the elements of fraud incorporated in the RICO predicate acts of mail fraud and wire fraud; (c) Seville sufficiently pleaded the elements of the RICO predicate act of interstate transportation of stolen property. The panel affirmed dismissal of the claim that petitioners conspired to violate RICO's substantive provisions.

Petitioners filed a petition for rehearing in banc arguing that the panel decision was inconsistent with prior Third Circuit case law and that the panel failed to address the issue of the scope of RICO and the requirement of alleging racketeering injury and prior convictions. In an order entered on October 3, 1984, the Third Circuit denied rehearing without opinion.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE THIRD CIRCUIT REGARDING THE REQUIREMENTS AND SCOPE OF A CIVIL RICO CLAIM IS IN CONFLICT WITH *TURKETTE* AND OTHER COURTS OF APPEAL.

Pursuant to Sup. Ct. R. 17.1(2), a writ of certiorari may be granted where a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. *See Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179, 181 (1967); *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 440-441 (1965). Also, certiorari is appropriate to review an important question of federal law. *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 505-506 (1962).

In several respects, the decision of the Third Circuit in this matter conflicts with decisions of other circuit courts of appeal

and with the decision in *United States v. Turkette,* 452 U.S. 576 (1981). Accordingly, a writ of certiorari should be granted by this Court and the judgment of the Third Circuit reversed.

A. The Third Circuit erroneously lessened the requirement of properly pleading an enterprise.

Only those persons injured by a pattern of racketeering activity conducted or operated through an enterprise may seek treble damages under RICO. 18 U.S.C. §1962. An enterprise is the vehicle fueled by a pattern of racketeering activity. An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4).

This Court held in *Turkette* that a RICO enterprise consists of an on-going organization, various associates functioning as a continuing unit for a common purpose, and an entity existing separate and apart from the pattern of racketeering. 452 U.S. at 583. *Accord United States v. Riccobene,* 709 F. 2d 214, 221 (3rd Cir.), *cert. den. sub. nom., Ciancaglini v. United States,* 104 S. Ct. 157 (1983).

Seville's complaint does not allege the requisite enterprise elements. The complaint alleges only that petitioner Gellman maintained an interest in the control of petitioners Southmost and Tri-State in violation of §1962(b)(¶19), and, as an employee or associate of an enterprise, conducted the activities of petitioners Southmost and Tri-State through a pattern of racketeering activity, in contravention of §1962(c) (¶21). Moreover, Seville states that each petitioner is an enterprise (¶7).

Absent is any allegation of an ongoing organization. Seville does not link together the acts of Alfieri, a Texas resident,

Gellman, a New Jersey citizen, Tri-State, a New Jersey corporation, and Southmost, a Texas corporation. Moreover, the District Court agreed with petitioners that it was improper to allege RICO violations by single-person enterprises: "It would be absurd for plaintiff to attempt to prove by a preponderance of the evidence that Mr. Gellman or Mr. Alfieri acquired or maintained an interest in themselves." 567 F. Supp. at 1151.

Also, the complaint fails to allege that various associates function as a continuing unit for a common purpose. No common purpose is referred to. No reference is made to the roles of each petitioner within an enterprise, or the positions that existed within that enterprise.

Finally, the complaint fails to distinguish between any enterprise and the alleged pattern of racketeering. The purported enterprise involving the petitioners can be understood only in terms of the fraudulent acts allegedly committed by them.

Despite these deficiencies, the Third Circuit reversed the dismissal of the complaint, holding that *Turkette* and *Riccobene* set forth only the proof and not the pleading requirements of RICO and that the enterprises were satisfactorily alleged. The Third Circuit erred in both respects.

Nothing in the *Turkette* or *Riccobene* opinions limits the discussion of RICO enterprise elements to a proof analysis. Admittedly, the *Turkette* and *Riccobene* courts were in the procedural posture of reviewing criminal RICO convictions, not determining the adequacy of civil pleadings. Nevertheless, their elucidation of the requisite elements of a RICO enterprise applies with equal force to the scrutiny of a civil complaint under a 12(b)(6) motion. The Federal Rules of Civil Procedure, despite a general relaxation of pleadings requirements, require that "the pleading still must state a 'cause of action' in the sense that it must show

'that the pleader is entitled to relief' ". 2A *Moore's Federal Practice* (2nd ed.) §8.13 at 8-117 (citations omitted). Absent at least a bare allegation of the elements of on-going organization, associates functioning as a continuing unit, and an entity separate from the pattern of racketeering, a plaintiff cannot be entitled to relief and his complaint must be deficient.

Moreover, the view of the Third Circuit that enterprise elements need not be pleaded is at odds with the position of the Eighth Circuit in *Bennett v. Berg,* 685 F. 2d 1053 (8th Cir. 1982), *cert. den. sub. nom., Prudential Insurance Co. of America v. Bennett,* 104 S. Ct. 527 (1983). In *Bennett,* the Eighth Circuit, reviewing the dismissal of a RICO complaint, considered whether the complaint properly alleged a RICO enterprise. *Id.* at 1061-1062. The Eighth Circuit, thus, implicitly held that an enterprise must be properly pleaded to survive a 12(b)(6) motion.

Additionally, the Third Circuit's holding that there is adequate pleading of an enterprise despite Seville's confusion of enterprises with defendants conflicts with the decisions of other circuits. *See United States v. Computer Sciences Corp.,* 689 F. 2d 1181, 1190 (4th Cir. 1982), *cert. den.,* 459 U.S. 1105 (1983); *Bennett v. Berg, supra; Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* Antitrust & Trade Reg. Rep. (BNA) No. 1190, at 885 (7th Cir. Oct. 19, 1984). In *Computer Sciences Corp.,* the Fourth Circuit held that the RICO enterprise must be distinct from the RICO defendants, 689 F. 2d at 1190, noting that a contrary construction leads to the possibility that "a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon." *Id.* at 1190. Similarly, the Eighth Circuit held in *Bennett* that RICO enterprises and defendants must be distinct. 685 F. 2d at 1061-1062. In *Haroco, Inc.,* the Seventh Circuit held that §1962(c) requires separate entities as the liable person and the enterprise whose affairs are conducted through a pattern of racketeering activity. Antitrust & Trade Reg. Rep., No. 1190, at

887. *But see United States v. Hartley,* 678 F. 2d 961, 989 (11th Cir. 1982), *cert. den.*, 459 U.S. 1170 (1983) (a corporation may be both an enterprise and a defendant). District courts in the First and Fourth Circuits have also expressed the view that RICO enterprises and defendants must be distinct. *See Van Schaik v. Church of Scientology of California, Inc.,* 535 F. Supp. 1125, 1136 (D. Mass. 1982); *In re Action Industries Tender Offer,* 572 F. Supp. 846 (E.D. Va. 1983).

Review of the Third Circuit decision is, therefore, necessary to reconcile the divergent views of the various circuit courts of appeal on the elements of a RICO enterprise and the necessity of alleging those elements in the complaint.

B. The Third Circuit erroneously failed to require a showing of racketeering injury.

Petitioners argued to the Third Circuit that Seville had failed to allege injury by reason of any racketeering activity; the damages, if any, suffered by Seville were alleged to be caused by the predicate acts of mail fraud, wire fraud, and interstate transportation of stolen property. The Third Circuit implicitly rejected petitioners' contention and erred in doing so.

There is a dispute among the various circuit courts of appeal regarding the standing requirement of racketeering injury. *Compare Sedima, S.P.R.L. v. Imrex Co., Inc.,* 741 F. 2d 482 (2nd Cir. 1984) *with Alexander Grant and Co. v. Tiffany Industries, Inc.,* 742 F. 2d 408 (8th Cir. 1984), *reh. den.*, ____ F. 2d ____ (8th Cir. October 31, 1984), *and Haroco, Inc., supra.* The *Sedima* court, affirming dismissal of a RICO complaint under 12(b)(6), held that the requirement in §1964(c) that plaintiffs suffer injury by reason of a violation of §1962 imposes a statutory requirement of alleging racketeering injury. 741 F. 2d at 494-495. In comparison, the *Alexander Grant* court, in reversing the

dismissal of a RICO complaint under 12(b)(6), held that no racketeering injury need be alleged, 742 F. 2d at 413, and the court in *Haroco, Inc.* similarly held that racketeering injury was not a prerequisite to a civil RICO claim. Antitrust & Trade Reg. Rep., No. 1190, at 886-887. In this area, as well, guidance from this Court is necessary, to resolve an unsettled state of law.

C. The Third Circuit erroneously failed to require allegation of prior convictions of the RICO predicate acts.

Petitioners urged the Third Circuit to grant rehearing and affirm dismissal on the ground that Seville had failed to allege that petitioners had been convicted of violations of the predicate RICO acts set forth in the complaint. The Third Circuit erroneously declined to do so.

The Second Circuit Court of Appeals has held that prior criminal convictions under the predicate acts or a prior RICO conviction are a prerequisite to bringing a civil RICO claim. *Sedima*, 741 F. 2d at 503. However, the Sixth and Seventh Circuits disagree with that position. *See USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F. 2d 94 (6th Cir. 1982); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F. 2d 1272 (7th Cir. 1983). The *USACO Coal* court held that nothing in the plain language of RICO limited civil liability to persons already convicted of criminal racketeering. 689 F. 2d at 95 n. 1. The Seventh Circuit in *Bunker Ramo* agreed with *USACO Coal* that a criminal conviction is not required before a civil RICO action may be maintained. 713 F. 2d at 1287. The squarely contradictory positions taken by the various courts of appeal must be resolved by this Court.

D. The Third Circuit erroneously reversed dismissal because Seville's claims are not within the scope of RICO.

Petitioners argued to the Third Circuit that Seville's claims of breach of contract and business fraud were not within RICO's intended scope. Indeed, this Court recently observed: "The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 104 S. Ct. 296 (1983). In reversing dismissal of the complaint, the Third Circuit implicitly rejected petitioners' argument.

Nevertheless, a number of other courts have rejected attempts to convert claims of ordinary business fraud into treble damages RICO claims. *See, e.g., Moss v. Morgan Stanley, Inc.,* 553 F. Supp. 1347 (S.D.N.Y.), *aff'd on other grounds,* 719 F. 2d 5 (2nd Cir. 1983), *cert. den. sub. nom., Moss v. Newman,* 104 S. Ct. 1280 (1984); *Parnes v. Heinold Commodities, Inc.,* 548 F. Supp. 20 (N.D. Ill. 1982); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.,* 527 F. Supp. 256 (E.D. La. 1981); *North Barrington Development, Inc. v. Fanslow,* 547 F. Supp. 207 (N.D. Ill. 1980); *Barr v. WUI/TAS, Inc.,* 66 F.R.D. 109 (S.D.N.Y. 1975).

In *Moss,* the district court dismissed a RICO action based on the use of insider information to commit securities fraud, saying: "The sweep of the statute does not embrace ordinary violators charged in common law fraud actions or federal securities law violations as the predicate offenses for RICO relief . . . ." 553 F. Supp. at 1361. The court in *Parnes,* dismissing a securities fraud-based RICO count, characterized the use of RICO in fraud actions as a "clearly unintended result reached in a clearly unintended way." 548 F. Supp. at 23. In *North Barrington,* the court dismissed a RICO claim arising out of breach of contract and fraud in a real estate development plan, explaining:

> [T]he purpose of the Act was to give law enforcement another tool with which to combat infiltration of legitimate business by racketeering influences and not to award treble damages for a breach of contract or common law fraud when the distinctive RICO violations did not contribute to plaintiff's injury.

547 F. Supp. at 211. In *Waterman S.S. Corp.*, the court dismissed a RICO action by a vessel owner against the manufacturer and installer of a faulty propulsion unit. The court held that RICO did not cover the owner's claims: "The civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their business in interstate commerce into treble damages RICO actions." 527 F. Supp. at 260. *See also Barr,* 66 F.R.D. at 112-113 (RICO has no application to defendant's anti-competitive increase in answering service rates). *But see Schact v. Brown,* 711 F. 2d 1343 (7th Cir.) (RICO encompasses business fraud), *cert. den. sub. nom., Arthur Andersen & Co. v. Schact,* 104 S. Ct. 508 (1983); *Moss,* 719 F. 2d 5 (2nd Cir. 1983) (scope of RICO left to Congress).

This Court has never addressed the limits of civil RICO actions, whose burgeoning number clog the federal court dockets. Given the dispute among the federal courts, certiorari should be granted to clarify the scope of civil RICO.

CONCLUSION

Since the decision of the Third Circuit in this matter conflicts with the decision of this Court in *Turkette* and with the decisions of other circuit courts of appeal, certiorari should be granted. Upon granting certiorari, this Court should reverse the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING REHEARING IN BANC DATED OCTOBER 3, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5575

SEVILLE INDUSTRIAL MACHINERY CORP.

Appellant

vs.

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., NORMAN GELLMAN, individually and doing business as Southmost Machinery Corp., and TRI-STATE MACHINERY CORP., and PAOLO ALFIERI, individually and doing business as SOUTHMOST MACHINERY CORP.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges,* and RAMBO,* *District Judge*

The petition for rehearing filed by APPELLEES SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., AND NORMAN GELLMAN in the

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* Honorable Sylvia H. Rambo, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Order

above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Hunter, III
Judge

Dated: Oct. 3, 1984

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 6, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5575

SEVILLE INDUSTRIAL MACHINERY CORP.

Appellant

vs.

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., NORMAN GELLMAN, individually and doing business as Southmost Machinery Corp., and TRI-STATE MACHINERY CORP., and PAOLO ALFIERI, individually and doing business as SOUTHMOST MACHINERY CORP.

Appeal From the United States
District Court For the
District of New Jersey - Newark
D.C. Civil No. 83-0149

Argued May 14, 1984

Before: GIBBONS, HUNTER, *Circuit Judges*, and SYLVIA H. RAMBO,* *District Judge*

Opinion filed September 6, 1984

Arthur H. Rosenberg (Argued)
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*Honorable Sylvia H. Rambo, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

Opinion

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OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. This appeal arises from a dismissal with prejudice of a civil complaint charging violations of the federal Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982), along with pendent state claims for fraud, breach of contract, and conversion. These claims arose from a series of transactions spanning a twenty-one month period and involving the sale of some seven hundred pieces of industrial equipment.

2. Plaintiff, Seville Industrial Machinery Corp. ("Seville"), alleges that defendants, Southmost Machinery Corp. ("Southmost"), Tri-State Machinery Corp. ("Tri-State"), Norman Gellman, and Paolo Alfieri,[1] fraudulently induced Seville to enter into various purchase, consignment, joint venture and service agreements regarding this machinery, and that this fraud constituted a "pattern of racketeering" in violation of RICO, 18 U.S.C. § 1962(b), (c), & (d) (1982).

3. The United States District Court for the District of New Jersey dismissed the complaint on defendants' motion, 567 F. Supp. 1146 (D.N.J. 1983). The district court judge dismissed Count One for failing to plead the elements of a RICO offense properly.

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1. Alfieri was never served with the summons or complaint and has not entered an appearance at any stage of this litigation.

Fed. R. Civ. P. 12(b)(6), and for failing to plead the underlying acts of fraud with sufficient particularity, Fed. R. Civ. P. 9(b). The judge dismissed the remaining state law claims for lack of pendent jurisdiction. We believe that the district court erred in concluding that Count One did not state a cause of action under RICO, and in concluding that the underlying fraud was not pleaded with sufficient particularity. Consequently, we will reverse in part, affirm in part, and remand to the district court for further proceedings.

I

4. Seville is a New Jersey corporation engaged in the business of buying and selling industrial machinery.[2] Southmost, a Texas corporation, and Tri-State, a New Jersey corporation, are also in the business of buying and selling industrial machinery. Gellman is an officer and controlling person of Southmost and of Tri-State, and Alfieri is an officer and controlling person of Southmost.

5. Seville alleges that beginning in May, 1981, it was induced by defendants to enter into a number of sale and other transactions involving over seven hundred pieces of industrial machinery, listed in Exhibits A through E attached to the complaint. Specifically, Seville alleges that defendants caused Seville to ship to them the machinery described in Exhibits A to C on consignment, representing that when the machinery was resold defendants would remit to Seville its purchase price along with fifty percent of the profits from resale. Second, Seville alleges that defendants induced it to enter into a joint venture to purchase the equipment described in Exhibit B for resale by defendants, promising to pay to Seville its pro rata share of the profits and of the cost of

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2. As we must in reviewing grants of motions to dismiss, we take as true the well-pleaded facts alleged in the complaint.

acquisition. Third, Seville alleges that it sold the machinery described in Exhibit D to defendants, on defendants' promise to pay Seville its purchase price. Finally, Seville alleges that it agreed to provide certain services in connection with the sale of the equipment listed in Exhibit E, on defendants' promise of compensation for those services. App. at 5-8.

6. Defendants never fulfilled their promises to pay Seville under these consignment, joint venture, purchase and service contracts. Seville alleges in its complaint that defendants made numerous fraudulent misrepresentations and omissions of material facts in each of these transactions, and that Seville relied on these misrepresentations and omissions in shipping the seven hundred pieces of machinery to defendants.

7. Count One of Seville's complaint alleges that defendants have violated the provisions of RICO by these actions. That Act makes it unlawful, *inter alia*, for any person[3] to acquire or maintain any interest in or control of an "enterprise" through "a pattern of racketeering activity." 18 U.S.C. § 1962(b) (1982). RICO also makes it unlawful for any person employed by or associated with any enterprise to conduct the affairs of the enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962(c) (1982).

8. An "enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." 18 U.S.C. § 1961(4) (1982).[4] "Racketeering

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3. "[P]erson" is defined to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1982).

4. Because RICO was enacted pursuant to the commerce clause, it extends only to acts involving an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b) & (c) (1982).

activity" is defined to include state law crimes such as murder, bribery, and extortion, and a specified list of federal crimes that includes mail fraud, 18 U.S.C. § 1341 (1982), wire fraud, *id.* § 1343 (1982), and interstate transportation and sale of stolen and fraudulently obtained goods, *id.* §§ 2314-2315 (1982). 18 U.S.C. § 1961(1) (1982). A "pattern of racketeering activity" requires at least two acts of racketeering activity within a ten year period. 18 U.S.C. § 1961(5) (1982).

9. In brief, RICO makes it unlawful to acquire or maintain control of an enterprise - broadly defined to include virtually any *de facto* or *de jure* association - through a pattern of criminal activity, or to use such an enterprise to engage in a pattern of criminal activity. 18 U.S.C. § 1962(b), (c) (1982). It is also unlawful to conspire to perform these acts. 18 U.S.C. § 1962(d) (1982). While RICO is primarily a criminal statute, it also provides for civil remedies, including a cause of action for treble damages, available to "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(d) (1982). Count One of Seville's complaint is stated to have been brought pursuant to this section.

10. Seville alleges that the four defendants, Southmost, Tri-State, Gellman, and Alfieri, are "enterprises" within the meaning of the Act, and that defendants in the course of their scheme violated federal laws prohibiting wire fraud, mail fraud and interstate transportation of stolen or fraudulently obtained goods. Seville alleges that defendant Gellman, through this pattern of racketeering activity, maintained an interest in or control of Southmost and Tri-State in violation of section 1962(b). Seville further alleges that Gellman, through his employment and association with Southmost and Tri-State, conducted their activities through this pattern of racketeering activity in violation of section 1962(c). Seville alleges

similar violations with respect to Alfieri and his control of and association with Southmost.

11. The district court ruled that Count One did not properly plead the existence of any "enterprise," and further that the underlying allegations of fraud lacked the particularity required by Fed. R. Civ. P. 9(b). He dismissed the complaint without leave to amend, stating, "A RICO cause of action has not been pleaded and probably cannot be pleaded in the circumstances set forth in the complaint." 567 F. Supp. at 1158.

II

A. Pleading the Existence of an Enterprise

12. Seville in its complaint alleged that "[d]efendants Southmost, Tri-State, Gellman and Alfieri are enterprises . . . ." App. at 4. The district court conceded that each of the defendants fell within the literal meaning of the definition of "enterprise" provided in section 1961(4). But, the court concluded, Seville's complaint was deficient because it did not further allege the three attributes of an enterprise outlined by this court in *United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied sub nom. Ciancaglini v. United States*, ___ U.S. ___, 104 S. Ct. 157 (1983).

13. *Riccobene* analyzed and explained a Supreme Court case, *United States v. Turkette*, 452 U.S. 576 (1981), which like *Riccobene* involved an appeal from conviction under RICO's criminal provisions. In *Riccobene* this court stated that in order to establish the existence of an enterprise, the government must demonstrate 1) that the enterprise is an ongoing organization with some sort of framework or superstructure for making or carrying out decisions; 2) that the members of the enterprise function as a continuing unit with established duties; and finally 3) that the enterprise must be separate and apart from

the pattern of activity in which it engages. 709 F.2d at 221-24. The court below ruled that because Seville failed to plead these three attributes, Count One did not state a cause of action under RICO and must be dismissed.

14. In so ruling, the district court confused what must be pleaded with what must be proved. *Riccobene* and *Turkette* certainly stand for the proposition that a plaintiff, to recover, must prove that an alleged enterprise possesses the three described attributes. But neither case speaks to what must be pleaded in order to state a cause of action. The district court erred in applying the *Riccobene-Turkette* proof analysis to the allegations in Seville's complaint.

15. We need cite no authority for the proposition that the Federal Rules of Civil Procedure were designed to eliminate the vagaries of technical pleading that once plagued complainants, and to replace them with the considerably more liberal requirements of so-called "notice" pleading. Under the modern federal rules, it is enough that a complaint put the defendant on notice of the claims against him. It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1215 (1969).

16. In the present case, Seville identified the four entities it believed were the enterprises that had been marshalled against it.[5] The rules of pleading requires

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5. In the district court and in its brief on appeal, Seville attempts to argue that it properly pleaded more enterprises than these four, and that its complaint should be read to allege as an enterprise any possible combination of the four named enterprises. To support this position, Seville relies on its allegations in the complaint that the four defendants/enterprises conspired with each other to defraud Seville.

The district court rejected this argument on the ground that a conspiracy to perform the underlying criminal offenses,

nothing more at this early juncture than that bare allegation.

17. Because it dismissed Count One for failing to plead an enterprise properly, the district court discussed but did not decide another issue raised by defendants - whether a defendant may also be an enterprise. The essence of the RICO offense is a defendant acting through or upon an enterprise. Some courts have suggested that because both a defendant and an enterprise are required to make out the offense, they cannot be the same entity. *See, e.g., United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 729 (1983); *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982). The district court was uncertain whether, by identifying three elements of a RICO offense in *Riccobene*, we implied that no fourth element - that is, separate identities of defendants and enterprises - exists. We need not decide this question here. As we have already held, the *Riccobene* proof standard is simply inapplicable to test the sufficiency of pleadings in a RICO case.

18. We conclude that Seville has properly alleged the existence of four separate enterprises, and reverse

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standing alone, is not sufficient to allege the existence of an enterprise. 567 F. Supp. at 1152. We agree. It is an essential element of the RICO cause of action that the "enterprise" be apart from the underlying pattern of racketeering activity. By limiting its allegations of conspiracy to the underlying offenses, Seville has affirmatively negated the existence of the third *Riccobene* factor: an enterprise separate and apart from the pattern of activity in which it engages. By its pleading, Seville has precluded itself from proving at trial that the four defendants together, or any lesser combination, formed an "enterprise." Unless the district court allows Seville to amend its complaint, Seville will be permitted to establish as enterprises only the four entities it specifically identified as such in its complaint.

the part of the district court's judgment that held to the contrary.

B. *Pleading Fraudulent Acts With Particularity*

19. A second reason given by the district court for dismissing Count One of Seville's complaint is that Seville failed to plead the circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with the particularity required by Rule 9(b). Seville charged defendants with violating federal wire and mail fraud statutes, and with violating federal laws prohibiting the interstate transportation and sale of fraudulently obtained goods. The district court found the allegations of fraud inherent in each of these offenses deficient because Seville did not describe the date, place or time of the phone calls and letters that defendants allegedly used in furtherance of their fraudulent scheme. In addition, the district court objected that the complaint failed to set forth "with even minimal particularity the details of the alleged fraud or misrepresentations." 567 F. Supp. at 1156.

20. We approach this question mindful of our recent admonition that in applying Rule 9(b), "focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96, 100 (3d Cir. 1983) (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1298, at 407 (1969)). We conclude that the district court subjected Seville's allegations of fraud to too strict a scrutiny. Rule 9(b) requires plaintiffs to plead with particularity the "circumstances" of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior. It is certainly true

that allegations of "date, place or time" fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud. In the present case, Seville adequately satisified the requirements of Rule 9(b) by incorporating into the complaint a list identifying with great specificity the pieces of machinery that were the subject of the alleged fraud. Moreover, Seville divided this list into five "exhibits" and identified which pieces of equipment were the subject of which alleged fraudulent transaction. The complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation.[6] In sum, we conclude that Seville has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9(b).

21. The district court also found that Seville's allegation that defendants had violated 18 U.S.C. §§ 2314 & 2315 (1982), prohibiting the interstate transportation and sale of stolen or fraudulently obtained goods worth more than $5,000, insufficient

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6. For example, ¶ 11B describes one of the alleged acts of fraud:

> [Defendants] [r]epresented to Seville that if the industrial machinery listed in Exhibits A and C were shipped on consignment to either Southmost, Tri-State, Gellman or Alfieri, that the industrial machinery would be resold, and that the purchase price paid by Seville for this equipment along with a 50% pro rata share of the profits resulting from resale would be distributed and paid back to Seville.

App. at 5-6.

because although Seville alleged total damages amounting to $759,039, it failed to allege that the goods in question were worth more than $5,000.

22. Defendants would have been well advised to plead the $5,000 requirement with greater specificity, as it is an essential element of the offense. But here again, the district court read Seville's allegations too strictly. Rule 8(f) requires a court scrutinizing pleadings to construe them "as to do substantial justice." By refusing to construe Seville's allegations that defendant transported and sold, or caused to be transported and sold, the machinery in interstate commerce, App. at 7, together with Seville's allegations that it was thereby injured to the extent of $754,039, the district court failed to heed the admonition of Rule 8(f). Plaintiff must, of course, be prepared at trial to prove with certainty that the goods transported and sold by defendants were worth more than $5,000; but we will not deny Seville the opportunity to do so by reading its allegations as narrowly as did the district court. We hold that Seville has properly pleaded that defendants' conduct violated 18 U.S.C. §§ 2314 & 2315 (1982).[7]

III

23. Seville has properly pleaded the elements of a claim alleging violations of section 1962(b) and section

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7. The district court also held that Seville had failed to plead the interstate component of the § 2314 and § 2315 offenses with the required particularity, since it had not alleged where and when the alleged transportation of fraudulently obtained goods occurred. The court applied Rule 9(b) to reach this holding. We hold this to be error. Rule 9(b) requires that fraud be pleaded particularly; it does not require that every element of an offense that includes fraud also be pleaded particularly. Seville adequately pleaded the interstate component of the offenses.

1962(c),[8] and the district court consequently erred in dismissing Count One of Seville's complaint.

24. In accordance with the foregoing opinion, we will reverse the judgment of the district court in part, affirm in part, and remand for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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8. The district court found insufficient Seville's claim that defendants had violated § 1962(d), which makes it unlawful to conspire to violate § 1962(b) or § 1962(c). We affirm the district court's dismissal of this conspiracy claim. Seville's complaint alleges only that the defendants conspired to commit the acts of fraud that constitute the alleged pattern of racketeering activity. As the district court correctly noted, § 1962(d) prohibits conspiracies to knowingly further the affairs of the enterprise: mere agreement to commit the predicate acts is not sufficient to support a charge of conspiracy under § 1962(d).

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, JULY 8, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 83-149

SEVILLE INDUSTRIAL MACHINERY CORP.,

Plaintiff,

v.

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., NORMAN GELLMAN, individually and doing business as SOUTHMOST MACHINERY CORP., and TRI-STATE MACHINERY CORP., and PAOLO ALFIERI, individually and doing business as SOUTHMOST MACHINERY CORP.,

Defendants.

Appearances:

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Opinion

BY: Michael B. Himmel, Esq.
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DEBEVOISE, District Judge.

Plaintiff, Seville Industrial Machinery Corporation, instituted this action against defendants, Southmost Machinery Corporation ("Southmost"), Tri-State Machinery Corporation ("Tri-State"), Norman Gellman ("Gellman"), an officer of Southmost and Tri-State, and Paolo Alfieri ("Alfieri"), an officer of Southmost. Plaintiff alleges violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, *et seq.*, fraud, breach of contract, and conversion. Jurisdiction is asserted under 18 U.S.C. §1964 and under the principles of pendent jurisdiction.

Defendants, Southmost, Tri-State and Gellman moved for dismissal of the complaint under Fed.R.Civ.P. 9(b), 12(b)(1), and 12(b)(6) and for lack of pendent jurisdiction, or, in the alternative, moved for a more definite statement pursuant to Fed. R. Civ. P. 12(e). Alfieri has not been served with the summons and complaint.

In order for defendants to succeed on their motion to dismiss, they must demonstrate "beyond a doubt that the plaintiff can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980). In meeting their burden, the defendants must accept as true the allegations set forth in plaintiff's complaint. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Hochman v. Board of Education of the City of Newark*, 534 F.2d 1094, 1097 n.1 (3d Cir. 1976).

Opinion

It is necessary to examine the elements of a RICO violation to determine whether plaintiff has alleged a set of facts which, if proved at trial, would entitle it to relief. General pleading rules require that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R. Civ.P. 8. Fed.R.Civ.P. 9(b) requires that all circumstances constituting fraud be stated with particularity.

The First Count of the complaint sets forth the facts upon which plaintiff relies for the RICO claim. Plaintiff, it is asserted, was the owner of certain industrial machinery listed in Exhibits A through F of the complaint. It is further asserted that Southmost and Tri-State, acting through their controlling persons Gellman and Alfieri, by means of fraudulent and misleading information induced plaintiff to sell or transfer possession of plaintiff's machinery to defendants for resale. It was represented that an agreed upon portion of the proceeds would be paid to plaintiff. It is claimed that defendants misrepresented the true ownership of the machinery to the persons to whom they sold it. Further, the complaint alleges that defendants persuaded plaintiff to enter into a joint venture with them to purchase equipment on the representation that the pro rata share of the costs of acquisition of the equipment along with the resulting profits from resale would be distributed and paid back to Seville. Finally, it is alleged that Gellman defrauded plaintiff by falsely representing that he was a business partner of plaintiff and thereby receiving a payment which should have been paid by a third party to plaintiff. According to the complaint, defendants have retained for their own use the money which they have received from these dealings instead of paying it over to plaintiff.[1]

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1. The other counts of the complaint allege various common law causes of action arising out of the same conduct which is claimed to give rise to the RICO count.

Opinion

The civil remedies section of RICO, 18 U.S.C. §1964(c), provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . [in federal court] . . . and shall recover threefold the damages he sustains and the cost of the suit including a reasonable attorney's fee.

The actions which RICO declares to be unlawful are enumerated in Section 1962 of the statute, all of which relate to the interaction between an "enterprise" affecting interstate or foreign commerce and a "pattern of racketeering activity." In its complaint, plaintiff charges violations of 18 U.S.C. §§1962(b), (c) and (d) by defendants as the basis of its recovery of damages under §1964(c).

Section 1962(b) makes it unlawful for any person "to acquire or maintain an interest or control of any enterprise" through "a pattern of racketeering or through collection of an unlawful debt." 18 U.S.C. §1962(b).

Section 1962(c) makes it unlawful for any person associated with an "enterprise" which affects interstate or foreign commerce to conduct or participate in the affairs of such enterprise through a "pattern of racketeering activity." 18 U.S.C. §1962(c).

Section 1962(d) simply states that it is unlawful for any person to conspire to violate any of the substantive provisions of Section 1962.

Defendants Southmost, Tri-State and Gellman seek dismissal of plaintiff's RICO claim stating that plaintiff fails to plead

properly: (1) the existence of an enterprise distinct from defendants, (2) a causal link between any pattern of racketeering activity and plaintiff's injury, and (3) a conspiracy to violate RICO. Defendants further state that the First Count of the complaint merely states a claim for common law fraud and that plaintiff should not be permitted to disguise its fraud claim as a RICO cause of action in order to avail itself of RICO's treble damages provision.

Proper pleading of substantive RICO violations such as those charged by plaintiff requires the averment of the existence of an "enterprise" which affects interstate or foreign commerce and the defendants' participation in the enterprise and in a "pattern of racketeering activity." 18 U.S.C. §1962(b), (c), and (d). *See United States v. Turkette*, 452 U.S. 576 (1981).

A. *Existence of an Enterprise*

"Enterprise", according to the statute, "includes any individual, partnership, corporation, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4).

It is clear that a legitimate business entity, such as a corporation, may constitute an "enterprise." *United States v. Brown*, 583 F.2d 659, 663 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court held that even a completely illegal organization may be an enterprise for RICO purposes. *Id.* at 583. The Court in *Turkette* set forth the elements necessary to establish the existence of such an enterprise: "evidence that the various associates function as a continuing unit" for a common purpose. *Id.* at 583. In addition, the enterprise must be shown to have

an existence "separate and apart from the pattern of activity in which it engaged." *Id.* at 583.

The Third Circuit recently analyzed *Turkette* in *United States v. Riccobene*, Crim. No. 82-1399, slip op. (May 20, 1983). The language of that opinion, read in conjunction with the facts of the case, throw considerable light upon what must be alleged and proved in order to find the evidence of an enterprise for RICO purposes.

In *Riccobene* the government charged that during the period 1972 to 1978 there existed an ongoing criminal enterprise implicating each of the defendants and that the enterprise engaged in illegal gambling, mail fraud, wire fraud, extortionate credit transactions and collection of unlawful debts. The evidence at the trial established the existence of an enterprise headed by Angelo Bruno and staffed by a number of other individuals with varying degrees of authority and differing responsibilities within the organization. The organization used different groupings of its members to engage in a number of discrete illegal activities referred to in the RICO Act. The Court concluded that the evidence was sufficient to demonstrate that an organization existed which satisfied the requirements for an enterprise and that all the members of the conspiracy knowingly agreed to participate in or conduct the enterprise through a pattern of racketeering.

(1) *Ongoing Organization*

The Third Circuit held that the first requirement of an "ongoing organization" is a showing that a structure exists for group decision making, whether it be hierarchial or consensual. *Id.* slip op. at 15. The Court stated that some mechanism must exist to control and direct group affairs on an ongoing rather than ad hoc basis. *Id.* slip op. at 15.

Opinion

Plaintiff's allegations in Count One of its complaint are insufficient to aver an "ongoing organization" for several reasons. First, plaintiff merely asserts that "defendants Southmost, Tri-State, Gellman and Alfieri are enterprises" (complaint, First Count, ¶17) without clarifying whether all four defendants comprise one enterprise or whether each defendant constitutes an "enterprise."

Plaintiff, however, could not logically allege violations of 18 U.S.C. §1962(b) and (c) by a single-person enterprise. For example, a defendant can violate Section 1962 only by acquiring or maintaining an interest in or control of the enterprise. 18 U.S.C. § 1962(b). It would be absurd for plaintiff to attempt to prove by a preponderance of the evidence that Mr. Gellman or Mr. Alfieri acquired or maintained an interest in themselves. Similarly, a violation of Section 1962 occurs only when a person is employed by or associated with an enterprise. A corporation such as Southmost and Tri-State could not employ itself or associate with itself. *See* Tarlow, *RICO Revisited*, 17 Georgia Law Review 291, 344-345 (1983).

Nor does plaintiff properly allege that all four defendants comprise one enterprise. For instance, plaintiff does not provide so much as a clue describing how Southmost, a corporation whose principal place of business is located in Texas, its officer, Mr. Alfieri, a Texas resident, belonged to an "ongoing organization" with Tri-State, a New Jersey corporation and its officer, Mr. Gellman, who plaintiff alleges is an officer of both Southmost and Tri-State and who is also a New Jersey citizen. Aside from assertions that the four defendants conspired with each other and committed numerous fraudulent acts, plaintiff does not mention any identifiable structure which would encompass all four defendants. Nor does plaintiff detail the roles each defendant

played in the "enterprise" or explain any interrelationship between the four defendants.

Furthermore, it is not clear that the term "enterprise" can be construed to embrace two corporations and two individuals who allegedly conspired to violate predicate offenses of RICO. Section 1961(4) contains two conjunctive phrases to define the term "enterprise." The first phrase describes legal entities: "any individual, partnership, corporation, association or other legal entity. . . ." The second phrase refers to non-legal entities: "any union or group of individuals associated in fact although not a legal entity." Since the complaint as pleaded does not allege that the combined entity of two corporations and two individuals operate as a legal entity, the "enterprise" named by plaintiff must fall within the second category of "associated individuals." Since the combined entity is not a union and is not "associated individuals," it does not come within the definition of "enterprise."

Plaintiff attempts to allege that defendants Southmost, Tri-State, Gellman and Alfieri associated with each other in fact by conspiring to commit mail fraud and wire fraud in connection with the title, purchase, shipment, and sale of Seville's industrial machinery.

However, this allegation of conspiracy cannot be sufficient to allege an "enterprise" for RICO purposes. Congress specifically provided in Section 1962(d) of RICO that a conspiracy to violate the substantive RICO offenses is itself a violation of RICO. 28 U.S.C. §1962(d). This indicates that Congress intended to establish a separate conspiracy offense in subsection (d) distinct from the offenses described in subsection (a), (b) or (c).

As the Eighth Circuit stated in *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980):

> [I]f a single . . . conspiracy to commit the predicate crimes were to fulfill the "enterprise" element of section 1962(c) violation, then a conspiracy to commit a 1962 violation would be defined as when a person, associated with a conspiracy to commit criminal acts, conspires to conduct those criminal acts. The awkwardness and duplication inherent in the structure of this articulation of the offense should be sufficient to suggest that we search for an alternative interpretation.

Plaintiff's interpretation of the enterprise requirement of Section 1962 of RICO would transform an allegation of a conspiracy into an allegation of an enterprise. I do not believe that the statutory scheme of RICO encompasses such an expansion of federal conspiracy law. If it were to be determined that an "enterprise" is sufficiently pleaded whenever a plaintiff avers that any two or more otherwise unassociated individuals agree to commit two or more acts of business fraud, this would effectively eliminate the enterprise element of RICO and drastically expand federal jurisdiction over all business torts which involve use of the mails or telephones. I conclude that this was not the Congressional intent in its enactment of the civil provisions of RICO. *See United States v. Bledsoe*, 674 F.2d 647, 661-662 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 456 (1983); *United States v. Anderson, supra.*

In *United States v. Bledsoe, supra,* the Eighth Circuit held that a group of agricultural cooperatives and corporations could not constitute an enterprise under RICO. The Court rejected the

government's contention that "any confederation, no matter how loose or temporary" can be an "enterprise." Rather, the Court construed RICO as requiring "some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering." *Id.* at 664.

In *United States v. Anderson, supra,* the Eighth Circuit also rejected the government's attempt to characterize the association of two county administrators as an enterprise. The Court held that Congress intended that the phrase "a group of individuals associated in fact although not a legal entity" as used in Section 1961(4) to encompass only "an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the . . . pattern of racketeering activity." *Id.* at 1372.

In the instant case, plaintiff has not alleged the existence of an "ascertainable structure" distinct from the alleged racketeering activity. In fact, defendant Alfieri is only alleged to be an officer and controlling person of defendant Southmost and is not alleged to have any connection with defendant Tri-State. Moreover, plaintiff alleges that defendant Gellman defrauded plaintiff through his misrepresentations made to one of plaintiff's customers. (Complaint, First Count, ¶¶18, 19). There is no allegation that Gellman's alleged misrepresentation was part of a larger racketeering scheme.

For all the above reasons, I find that the First Count of plaintiff's complaint is deficient since it fails to allege the existence of an "ongoing organization" which is the first element of the RICO "enterprise" requirement.

(2) *Continuing Unit for Common Purpose*

Not only does plaintiff fail to allege an ongoing organization, but it also fails to plead the second necessary element of an enterprise under RICO, namely, that "the various associates function as a continuing unit" for a common purpose. *United States v. Turkette, supra,* at 583.

At no point in its complaint does plaintiff allege what "common purpose" characterized defendants' enterprise. Plaintiff fails to refer to any purpose behind any enterprise, whether that enterprise consists of all four defendants operating collectively or whether each defendant comprises its own enterprise. Nor does plaintiff sufficiently allege the existence of a "continuing unit." The Third Circuit in *United States v. Riccobene, supra,* held that the participants in the enterprise occupy continuing positions in the group. The Court explained that each person must perform a role in the group which is consistent with the enterprise's organizational structure and which furthers the activities of the organization. *Id.* slip op. at 17-18.

The First Count of plaintiff's complaint is deficient in this respect as well since it neither specifies the positions that existed in each separate enterprise or in the collective enterprise. Nor does plaintiff allege the individual roles that each of the defendants played within the enterprise. Plaintiff merely alleges that from May 1981 to the date of the complaint, the defendants conspired to defraud plaintiff in connection with the title, purchase, shipment, and sale of plaintiff's industrial machinery. (Complaint, First Count, ¶18). In furtherance of this conspiracy, plaintiff lists, without providing specific dates or instances, a number of fraudulent acts that defendants allegedly committed or caused to be committed. (Complaint, First Count, ¶11). With the

exception of paragraph 18, plaintiff fails to allege whether the defendants operated collectively or on their own initiative. This is simply not sufficient to aver a "continuing unit functioning for a common purpose."

(3) *Separation between Enterprise and Racketeering Activity*

The third and final element in establishing the enterprise is that the organization must be "an entity separate and apart from the pattern of activity in which it engaged." *United States v. Turkette, supra,* at 583. As the Third Circuit interprets this third requirement, it is necessary for the plaintiff to show that the enterprise has an existence beyond that which is necessary merely to commit the alleged predicate racketeering offenses. *United States v. Riccobene, supra,* slip op. at 19.

I cannot find that plaintiff alleges an enterprise separate and apart from the alleged predicate offenses. As mentioned earlier, it is unclear whether plaintiff even alleges the existence of one or four enterprises. The complaint simply does not provide any clear delineation of the scope or activities of the enterprise. In fact, the alleged "enterprise" involving Southmost, Tri-State, Gellman and Alfieri only can be understood in terms of the fraudulent acts that plaintiff claims the defendants committed. (Complaint, First Count, ¶¶10-24).

I find that the First Count of plaintiff's complaint fails to satisfy the separate existence requirement since it pleads the existence of an "enterprise" which is apparently synonymous with the defendants' alleged "pattern of racketeering activity."

(4) *Separation between Enterprise and Racketeers*

A further "separation" problem exists in plaintiff's complaint. Plaintiff alleges that defendants are both the "enterprise" and the racketeers operating the enterprise. Some courts have concluded that such an allegation is inconsistent with RICO.

Sections 1962(b) and (c) require the allegation of two entities:

(1) a "person" who either acquires or controls an enterprise pursuant to subsection (b) or who is employed by or associated with an enterprise pursuant to subsection (c), and

(2) an "enterprise" through which that person engaged in a pattern of racketeering activity. *See* 18 U.S.C. §1962.

Under Section 1962, it is unlawful for the *person* to participate in the affairs of the enterprise through racketeering activity. RICO, however, does not hold the infiltrated *enterprise* itself liable. *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982); *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982); *Bays v. Hunter Savings Assoc.*, 539 F. Supp. 1020, 1023-24 (S.D. Oh. 1982); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982).

It would be a distortion of the statute, so the argument goes, to allow the four defendants to assume both the identity of an infiltrated enterprise and of racketeering persons. *United States v. Computer Sciences Corp., supra*, at 1190; *Bennett v. Berg, supra*, at 1061; *Parnes v. Heinold Commodities, Inc., supra*,

at 23-24; *Bays v. Hunter Savings Assoc., supra,* at 1023-24; *Van Schaick v. Church of Scientology of Cal., Inc., supra,* at 1136. Such a rule would permit "a defendant [to] conspire with his right arm, . . . hold[ ] and fire[ ] the fatal weapon" into itself. *United States v. Computer Sciences Corp., supra,* at 1190.

I am not sure that this fourth requirement to establish an enterprise has been adopted in this Circuit. Two unreported decisions in this district note with apparent approval *United States v. Hartley,* 678 F.2d 961 (11th Cir. 1982), citing it for the proposition that defendants in a criminal RICO case may be both the "persons" and the "enterprises" in question. *Mooney v. Fidelity Union Bank,* Docket No. 82-3192, 3193 (March 22, 1983) (Ackerman, J.); *Coastal Steel Corporation v. Chemical Bank,* Docket No. 82-1714 (Oct. 27, 1982) (Thompson, J.) Slip Op. at 14. In *Riccobene, supra,* the Court recited *three* elements of an enterprise: (i) an ongoing organization, (ii) functioning of the associates as a continuing unit and (iii) the existence of the enterprise separate and apart from the pattern of activity in which it engages. The Court referred to the latter criterion as "the third and *final* element in establishing the enterprise." Slip op. at 19 (emphasis added). Taken literally, that characterization suggests that there is no fourth element of an enterprise, that is, a separate identity between the enterprise and the racketeers.

It is unnecessary to reach this question, however. Whether the complaint alleges that the four defendants individually constitute the enterprise or whether it alleges the defendants collectively constitute the enterprise, it fails to allege the three elements identified by the Supreme Court in *Turkette* and by the Third Circuit in *Riccobene* as necessary to establish an enterprise.

The First Count of plaintiff's complaint must be dismissed because the proper pleading of an "enterprise" as defined in 18 U.S.C. §1961(4) is essential to prove a violation of any of the subsections of 18 U.S.C. §1962 and to recover treble damages, attorney's fees, and costs pursuant to 18 U.S.C. §1964.

B. *Conspiracy Claim*

Plaintiff also alleges in its First Count that defendants violated Section 1962(d), the conspiracy subsection of RICO. This section provides:

> [i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. §1962(d).

As discussed above, plaintiff fails to properly allege a violation of either Section 1962(b) or (c). However, even if these pleading deficiencies were corrected, plaintiff still does not properly allege a conspiracy cause of action against defendants.

A conspiracy to violate RICO is comprised of three elements: (1) knowledge by the defendant of the essential nature of the conspiracy; (2) the defendant's objective manifestation of an agreement to participate in the conduct of the affairs of an enterprise; and (3) an overt act, which need not be a crime, in furtherance of the conspiracy. *United States v. Sutherland*, 656 F.2d 1181 n.4, and 1193 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

The Third Circuit analyzed these elements of a RICO conspiracy in *United States v. Riccobene, supra*. The Court stated

that an agreement merely to commit the predicate offenses would not be sufficient to support a RICO conspiracy. Nor is it sufficient if the defendants merely participated in the same enterprise. *Id.* slip op. at 20. The Third Circuit explained that this is so because, under RICO, it is an agreement *to assist the enterprise's* involvement in corrupt endeavors that is prohibited, not an agreement to commit a pattern of racketeering alone. *Id.* slip op. at 20. A plaintiff must show that the defendants "understood the scope of the enterprise and knowingly agreed to further its affairs through the commission of various offenses." *Id.* slip op. at 21.

In the instant case, plaintiff's complaint does not even describe the scope of the "enterprise" much less allege that the defendants had knowledge of the enterprise's scope and knowingly conspired to further the enterprise through their racketeering activity. Although plaintiff does allege that defendants conspired to commit mail fraud and wire fraud, plaintiff fails to allege a RICO conspiracy since it does not state that defendants made their agreement in order to further the affairs of a RICO "enterprise."

Therefore, the First Count of plaintiff's complaint fails to allege that defendants violated Section 1962(d), the conspiracy subsection of RICO. 18 U.S.C. §1962(d). This is a further ground for dismissal.

C. Pattern of Racketeering

In order to allege a RICO cause of action, plaintiff must show not only that defendants participated in the operation of an enterprise but also that they did so "through a pattern of racketeering activity or collection of an unlawful debt." 18 U.S.C. §1962(b) and (c). RICO defines "pattern of racketeering activity" as:

> at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.

18 U.S.C. §1961(5).

(1) *Commission of Two or More Predicate Crimes*

"Racketeering activity" in 18 U.S.C. §1961(1) is defined by incorporating specifically enumerated state and federal offenses including mail fraud (18 U.S.C. §1341), wire fraud (18 U.S.C. §1343), and interstate transportation of stolen property (18 U.S.C. §§2314, 2315). It appears from the definition of "pattern of racketeering activity" that any combination of two listed offenses may constitute a "pattern" for RICO purposes.

In its complaint, plaintiff alleges that between May 1981 and the date of the complaint, defendants used the telephone, the mail, and other facilities of interstate commerce, to knowingly provide plaintiff with false and misleading information to induce plaintiff to enter into purchase, consignment, joint venture and service contracts with defendants in connection with its industrial machinery. (Complaint, First Count, ¶11A). Plaintiff further alleges that since May 1981 defendants have transported and sold or caused to be transported and sold in interstate commerce, the industrial machinery fraudulently obtained from plaintiff. (Complaint, First Count, ¶11G). Plaintiff claims that the acts of defendants constitute federal mail fraud, 18 U.S.C. §1341, federal wire fraud, 18 U.S.C. §1343, and interstate transportation of stolen property, 18 U.S.C. §§2314, 2315.

Opinion

The elements of an indictable offense under the federal mail and wire fraud statutes are: (1) a scheme designed to defraud or to obtain money or property by false pretenses and (2) use of the mails or interstate wires (including interstate telephone calls) in furtherance of the fraudulent scheme. Specific intent to defraud must be pleaded and proved. *See, e.g., United States v. Giovengo*, 637 F.2d 941, 945 (3d Cir. 1980), *cert. denied*, 450 U.S. 1032 (1981); *United States v. Von Barta*, 635 F. 2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).

I find that plaintiff does plead that defendants used the United States mails and interstate means of communications "in furtherance" of their scheme. Plaintiff need not allege that defendants personally mailed or used interstate wires. Nor is it essential to establish that the use of mails or interstate wires was required for carrying out the scheme. *See Periera v. United States*, 347 U.S. 1 (1954).

Moreover, plaintiff does allege that at least two predicate acts of mail fraud or wire fraud occurred. (Complaint, First Count, ¶11). Furthermore, since all of defendants' actions allegedly occurred after May 1981, plaintiff properly alleges that the last predicate racketeering act took place within ten years after the commission of a prior act of racketeering.

However, defendants correctly state that Fed.R.Civ.P. 9(b) requires that all circumstances constituting fraud be plead with particularity. Plaintiff fails to describe the date, place, or time of any phone calls or letters or other forms of interstate communication. Nor does the plaintiff's complaint set forth with even minimal particularity the details of the alleged fraud or misrepresentations.

I find that this lack of specificity caused plaintiff's allegations of mail fraud and wire fraud to be deficient.

Plaintiff also alleges that defendants fraudulently obtained, transported, and sold plaintiff's industrial machinery in violation of 18 U.S.C. §§2314, 2315.

In relevant part, 18 U.S.C. §2314 prohibits a person from "transport[ing] in interstate or foreign commerce any goods . . . of the value of $5,000 or more, knowing the same to be stolen, converted, or taken by fraud."

In pertinent part, 18 U.S.C. §2315 prohibits a person from "receiv[ing], conceal[ing],. . . sell[ing], or dispos[ing] of any goods . . . of the value of $5,000 or more . . . which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken."

Although it is not necessary that the transportation of property be an essential part of a specific fraud, *United States v. Sheridan*, 329 U.S. 379, 384-385 (1946), plaintiff must allege that defendants transported or caused to transport with unlawful and fraudulent intent and with knowledge that the property was fraudulently obtained. *See United States v. Saka*, 339 F.2d 541, 543 (3d Cir. 1964). Moreover, it is an essential element of the charge of interstate transportation of stolen goods that the goods transported be worth $5,000 or more. *United States v. Weinberg*, 478 F.2d 1351, 1353 (3d Cir. 1973).

In the instant case, plaintiff alleges that it has suffered business and property damages of $759,039. However, the complaint does not specify whether defendants transported or caused to transport over $5,000 worth of fraudulently obtained goods. Nor does

plaintiff allege that defendants transported or caused to be transported these goods with knowledge that the property was fraudulently obtained.

Additionally, plaintiff fails to allege its interstate transportation claim with the particularity required by Fed.R.Civ.P. 9(b). Plaintiff lists no specific dates, places, or times to support its claim that defendants transported and sold fraudulently obtained goods. Nor does plaintiff's complaint set forth any details of the alleged fraud.

For the above reasons, I find plaintiff's allegations of interstate transportation of fraudulently obtained goods to be deficient.

The First Count of plaintiff's complaint will be dismissed because it fails to allege at least two acts of racketeering activity with sufficient particularity and thus fails to allege that defendants engaged in a "pattern of racketeering activity" as required by 18 U.S.C. §1962.

(2) *Requirement of "Racketeering Injury"*

Defendants also urge dismissal of the First Count for failing to show a causal link between a "pattern of racketeering activity" and the injury. Defendants reason that Section 1964(c) permits treble damage actions when an injury to business or property occurs "by reason of a violation of § 1962." 18 U.S.C. §1964(c). Defendants point to a number of courts which restrictively construe

this language to mean that the injury to plaintiff must be caused by the operation of an enterprise through a pattern of racketeering or a so-called "racketeering enterprise injury." By this, the court means an injury different from the harm which results to a plaintiff from violations of the underlying predicate offenses. *See, e.g., Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1360 (S.D.N.Y. 1983); *Harper v. New Japan Securities International*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982); *Landmark Savings & Loan v. Rhoades*, 527 F. Supp. 206, 208 (E.D. Mich. 1981).

However, this judicially imposed requirement of a "racketeering enterprise injury" seems artificial and unwarranted by the language of the RICO statute. Moreover, a number of commentators have noted that application of the "racketeering injury" requirement could lead to the anomalous result of denying standing to persons concededly the direct victims of racketeering activity. Natan, *Civil RICO: A Primer on the Emerging Use and Abuse of an Elastic Treble Damage Remedy*, 3 ALI-ABA Civil Practice and Litigation in Federal and State Courts 1491, 1536-1537 (1983); Strafer, Massumi, Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling."* 19 Am. Cr. L. Rev. 655, 706 (1982); *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1109-1114 (1982).

Furthermore, mosts courts which have sustained civil RICO complaints have accorded standing to the direct victims of the predicate acts without any need for the additional element of a "racketeering enterprise injury." *See, e.g., Bennett v. Berg*, 685 F. 2d 1053, 1058 (8th Cir. 1981); *O'Connor v. Brown*, Docket No. 81-C-1475 (N.D. Ill. filed 1982); *Getterman v. Vitoulis*, Docket

No. 82 Civ. 6985 (S.D.N.Y. April 30, 1982); *Meineke Discount Muffler Shops, Inc. v. Noto,* 548 F. Supp. 352, 354 (E.D.N.Y. 1982).

The argument that plaintiff fails to allege a "racketeering enterprise injury" is rejected. The First Count of the complaint clearly alleges that plaintiff suffered direct injury from defendants' alleged racketeering activity and will not be dismissed for its failure to allege a separate and distinct "racketeering injury."

D. *Scope of RICO*

Defendants argue that plaintiff has disguised a simple business fraud cause of action as a RICO claim in order to avail itself of RICO's treble damages provision. Defendants maintain that Congress never intended RICO to reach business fraud, conversion, and contract claims such as alleged by plaintiff.

It is clear that the civil provisions of RICO were not enacted for the purpose of imposing federal liability for state business fraud claims. The primary intent of Congress in enacting 18 U.S.C §1962 was to combat the infiltration of organized crime into legitimate businesses operating in interstate commerce. S. Rep. No. 91-617, 91st Cong., 1st Sess. 76 (1969); *United States v. Turkette,* 452 U.S. 576, 593 (1981).

The civil provisions at issue in this case were not part of the RICO bill as originally introduced and passed by the Senate. S. 30, 91st Cong., 2d Sess., 116 Cong. Rec. 952-72 (1970). At the urging of the Department of Justice and the American Bar Association, the House Judiciary Committee added a private RICO cause of action patterned on Section 4 of the Clayton Act. S.

30, 91st Cong., 2d Sess., 116 Cong. Rec. 35, 295-96 (1970). The proposal did not generate debate. Proponents of the measure simply stated that the "anti-trust machinery" of the Clayton Act could be effectively utilized in the RICO context to root out organized crime that infiltrated into legitimate business. *See Organized Crime Control: Hearing for Subcommittee No. 5 of the House Committee on Judiciary*, 91st Cong., 2d Sess., 157, 170-72, 294, 519-20 (1971).

Moreover, if Section 1964(c) were broadly construed, courts would be confronted with an avalanche of RICO civil damages actions. Since virtually all business transactions involve use of the mails or telephones and many business dealings involve the transportation of goods between state lines, the civil sections of RICO could federalize an enormous number of fraudulent business transactions.

However, the Supreme Court noted in *United States v. Turkette*, 452 U.S. 576 (1981) that Congress was well aware in enacting RICO that it would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." *Id.* at 586. The court stated that Congress acted within its power in including state law crimes within the definition of "racketeering" and that courts are without authority to restrict the application of the statute. *Id.* at 587.

Furthermore, the terms of RICO expressly include mail fraud, wire fraud, and the transportation of stolen goods as predicate acts within the scope of RICO. 18 U.S.C. §1961(1)(B).

The precise scope of RICO is a difficult determination and one that need not be reached in view of the deficiencies of

plaintiff's complaint. A RICO cause of action has not been pleaded and probably cannot be pleaded in the circumstances set forth in the complaint.

Accordingly, defendants' motion to dismiss the First Count of the complaint will be granted.

E. *Pendent Claims*

Plaintiff also alleges a number of pendent state law claims, namely, fraud (Second Count), contract breach (Third Count), conversion (Fourth Count), and tort (Fifth Count).

Pendent jurisdiction is a discretionary doctrine which allows a party to try in one judicial proceeding all claims arising out of a "common nucleus of operative fact" where to do so would promote judicial economy and convenience. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966). However, the power of a court to exercise pendent jurisidiction requires, at a minimum, a federal claim with sufficient substance to confer subject matter jurisdiction on the court. *Id.* at 725; *Tully v. Mott Supermarkets,* 540 F.2d 187, 196 (3d Cir. 1976).

The Third Circuit Court has recently held that:

> If it appears that the federal claim is subject to dismissal under F.R.Civ.P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances. . . .

Lechtner v. Brownyard, d/b/a W.H.Y.P. Country Radio, 679 F.2d 322 (3d Cir. 1982), *citing Tully v. Mott Supermarkets, supra.* No such extraordinary circumstances exist in this case.

Upon dismissal of the First Count of the complaint no federal issues will remain. Therefore the pendent state claims will be dismissed as well. The parties are, of course, free to bring their state claims to the New Jersey state court for resolution in that forum.

The court will file its own order.

DATED: July 8, 1983.

s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.D.J.

COMPLAINT FILED JANUARY 14, 1983 (EXHIBITS DELETED)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-149 M

SEVILLE INDUSTRIAL MACHINERY CORP.,

Plaintiff,

vs.

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., NORMAN GELLMAN, individually and doing business as SOUTHMOST MACHINERY CORP. and TRI-STATE MACHINERY CORP., and PAOLO ALFIERI, individually and doing business as SOUTHMOST MACHINERY CORP.,

Defendants.

Seville Industrial Machinery Corp. (hereinafter "Seville"), complaining of the defendants, states:

FIRST COUNT

1. Jurisdiction exists pursuant to Section 901(a) of the Organized Crime Control Act of 1970, 18 U.S.C. §1961 *et seq.*, and principles of pendent jurisdiction, all as hereinafter more fully appear.

2. Plaintiff is a New Jersey corporation with its principal place of business located at 124 Market Street, Saddlebrook, New Jersey, 07662.

3. Defendant Southmost Machinery Corp. (hereinafter "Southmost") is a corporation organized under the laws of the State of Texas, with its principal place of business located at 6397 Boca Chica Boulevard, Brownsville, Texas, 78520.

4. Defendant Tri-State Machinery Corp. (hereinafter "Tri-State") is a corporation organized under the laws of the State of New Jersey, with its principal place of business located at Saddlebrook, New Jersey.

5. Defendant Norman Gellman is a citizen and resident of the State of New Jersey, with his residence located at Horizon Road, Apartment 1604, Fort Lee, New Jersey. Norman Gellman is an officer of Southmost and Tri-State and a controlling person of these corporations.

6. Defendant Paolo Alfieri is a citizen and resident of the State of Texas, with his residence located at Brownsville, Texas. Paolo Alfieri is an officer of Southmost and a controlling person thereof.

7. Defendants Southmost, Tri-State, Gellman and Alfieri are enterprises engaged in inter-state commerce and activities which affect inter-state commerce.

8. On or about May 1981 and continuously thereafter up to and including the day of this Complaint, in the State of New Jersey, Texas and elsewhere, defendants Southmost, Tri-State, Gellman and Alfieri did aid and abet each other, combine, conspire, confederate and agree with each other and with diverse other people whose names are presently unknown, to defraud Seville in connection with the title, purchase, shipment and sale of the industrial machinery listed in Exhibits A through F annexed hereto.

9. Seville had right, title, interest and possession in the industrial machinery listed in Exhibits A through F.

10. It was part of said conspiracy that Southmost and Tri-State, by their controlling persons Gellman and Alfieri, induced Seville to enter into purchase, consignment, joint venture and service contracts with Southmost, Tri-State, Gellman and Alfieri, for the industrial machinery listed in Exhibits A through E.

11. In furtherance of said conspiracy and to affect the object thereof, Southmost, Tri-State, Gellman and Alfieri committed or caused to be committed the following acts:

A. Between May 1981 and the date of this Complaint by use of the telephone, the U.S. Mail and other facilities of inter-state commerce, knowingly provided Seville with false and misleading information as inducement to Seville to enter into purchase, consignment, joint venture and service contracts with said defendants for the industrial machinery listed in Exhibits A through E.

B. Represented to Seville that if the industrial machinery listed in Exhibits A and C were shipped on consignment to either Southmost, Tri-State, Gellman or Alfieri, that the industrial machinery would be resold, and that the purchase price paid by Seville for this equipment along with a 50% pro rata share of the profits resulting from resale would be distributed and paid back to Seville.

C. Represented to Seville that Seville and Southmost purchase the equipment, listed in

Exhibit B, in joint venture, and that this equipment would then be resold by Southmost, Tri-State, Gellman or Alfieri and that the pro rata share of costs of acquisition of this equipment to Seville along with profits resulting from resale would be distributed and paid back to Seville.

D. Represented to Seville that Seville sell the equipment listed in Exhibit D to Southmost, Tri-State, Gellman, Alfieri and that the purchase price of this equipment would be paid to Seville.

E. Represented to Seville that Seville provide services in connection with the sale of the equipment listed in Exhibit E and that for providing such services Seville would receive compensation.

F. Pursuant to the solicitations of said defendants and based upon the false and misleading information provided to Seville, Seville entered into consignment, joint venture, purchase and service contracts with the defendants for the industrial machinery listed in Exhibits A through E.

G. Since May 1981, Southmost, Tri-State, Gellman and Alfieri have transported and sold, or caused to be transported and sold, in interstate commerce, the industrial machinery fraudulently obtained from Seville and listed in Exhibits A through E.

H. Since May 1981 Seville, Tri-State, Gellman and Alfieri have attempted to conceal their fraud

from Seville by refusing to account for funds received by them from the resale of the industrial machinery listed in Exhibits A through E and fraudulently obtained from Seville.

I. To the date of this Complaint, Southmost, Tri-State, Gellman and Alfieri have not paid monies due and owing Seville from the consignment, joint venture, purchase and service contracts entered into with Seville for the industrial machinery listed in Exhibits A through E.

12. The fraudulent misrepresentations and omissions set forth herein concern material facts and were made or omitted from written and oral communications to Seville in connection with the consignment, joint venture, purchase and service contracts for the industrial machinery listed in Exhibits A through E.

13. Without knowledge of the true facts, and in reliance upon the fraudulent and misleading representations, statements, warranties and omissions, Seville shipped the industrial machinery listed in Exhibits A through E to defendants Southmost, Tri-State, Gellman and Alfieri.

14. Defendants Southmost, Tri-State, Gellman and Alfieri have represented, or caused to be represented to third persons, that they had sole, complete, good, clear, legal and marketable title to the industrial machinery listed in Exhibits A through E.

15. The funds, monies and other forms of compensation received by Southmost, Tri-State, Gellman and Alfieri in connection with the selling of industrial machinery listed in Exhibits A through E have been converted and used by defendants in

interstate commerce for the purpose of purchasing, transporting and selling other industrial machinery and equipment, all to the detriment of Seville.

16. Defendant continues to use these monies as working capital for their enterprises.

17. The acts of Southmost, Tri-State, Gellman and Alfieri constitute criminal violations of the law of the United States, in particular, 18 U.S.C. §1341, 1343 and 2314. All of such criminal violations constitute "racketeering activity" within the meaning of 18 U.S.C. §1961(1) and together constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. §1961(5).

18. In addition to the criminal acts alleged herein, on or about January 15, 1981 Gellman defrauded Seville in connection with monies due and owing Seville by fraudulently representing to one Schmeling Cruz, a controlling person of Jaguar Imports, a corporation organized under the laws of Santo Domingo, that Gellman was a business partner of Seville. As a result thereof, monies paid by Cruz to Gellman for industrial machinery sold to Jaguar Imports by Seville and listed in Exhibit F were converted by Gellman for his own purpose. Seville has not received any of the monies paid by Cruz to Gellman. In the course of perpetrating such fraud, Gellman violated the criminal laws of the United States, in particular, 18 U.S.C. §1341, 1343 and 2314. All of such criminal violations constitute "racketeering activity" within the meaning of 18 U.S.C. §1961(1) and together constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. §1961(5).

19. Gellman, through the pattern of racketeering activity recited herein, maintained an interest in the control of Southmost and Tri-State in violation of 18 U.S.C. §1962(b).

20. Alfieri, through the pattern of racketeering activity recited herein, maintained an interest in the control of Southmost in violation of 18 U.S.C. §1962(b).

21. Gellman, through his employment and association with Southmost and Tri-State, conducted its activities, which activities effected inter-state commerce, through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(c).

22. Alfieri, through his employment and association with Southmost conducted its activities, which activities effect inter-state commerce, through a pattern of racketeering, in violation of 18 U.S.C. §1962(c).

23. The violation of 18 U.S.C. §1962(b) and (c) by Southmost, Tri-State, Gellman and Alfieri have damaged Seville in its business and property. Specifically, Seville has been defrauded of $759,039.00.

24. By reason of the foregoing, pursuant to 18 U.S.C. §1964(c), plaintiff Seville is entitled to recover from defendants Southmost, Tri-State, Gellman and Alfieri, jointly and severally, that amount three-fold, or $2,277,116.00 and the cost of this suit, including reasonable attorneys' fees.

SECOND COUNT

1. Plaintiff Seville repeats and realleges all preceding paragraphs of this Complaint as if fully set forth herein.

2. The acts of Southmost, Tri-State, Gellman and Alfieri were perpetrated in an attempt to defraud Seville.

3. Seville relied upon the material misrepresentations and warranties that were fraudulently made to it by Southmost, Tri-State, Gellman and Alfieri, to its detriment.

4. By reason of the foregoing, defendants Southmost, Tri-State, Gellman and Alfieri are jointly and severally liable to Seville for its loss, costs and damages in the amount of $759,039.00 plus interest and profits thereon, in an amount to be determined at trial.

THIRD COUNT

1. Plaintiff Seville repeats and realleges all preceding paragraphs of this Complaint as if fully set forth herein.

2. Southmost, Tri-State, Gellman and Alfieri have completely breached their representations and warranties made by them in the consignment, joint venture, purchase and service contracts as alleged above.

3. As a result of such breach, defendants Southmost, Tri-State, Gellman and Alfieri are jointly and severally liable to Seville for its loss, costs and damages in the amount of $759,039.00 plus interest and profits thereon in the amount to be determined at trial.

FOURTH COUNT

1. Plaintiff Seville repeats and realleges all preceding paragraphs of this Complaint as if fully set forth herein.

2. On or about January 1978 and continuing thereafter until the date of this Complaint, defendants Southmost, Tri-State, Gellman and Alfieri have converted to their own use, the industrial machinery listed in Exhibits A through E and the monies received

from the sale of this industrial machinery which were the property of plaintiff Seville.

3. Plaintiff Seville has demanded payment of the purchase price for the industrial machinery listed in Exhibits A through F, together with their pro rata share of the profits resulting from the sale of said industrial machinery. Defendants Southmost, Tri-State, Gellman and Alfieri have refused to comply with plaintiff's demands.

4. By reason of the foregoing, defendants Southmost, Tri-State, Gellman and Alfieri are jointly and severally liable to Seville for its loss, costs and damages in the amount of $759,039.00 plus interest and profits thereon in an amount to be determined at trial.

FIFTH COUNT

1. Plaintiff Seville repeats and realleges all preceding paragraphs of this Complaint as if fully set forth herein.

2. Defendants Southmost, Tri-State, Gellman and Alfieri have acted intentionally, wilfully, wantonly, and recklessly in disregard of the property rights of plaintiff Seville. As a result of such conduct, defendants Southmost, Tri-State, Gellman and Alfieri are each liable to plaintiff Seville for punitive damages in the amount of $1,000,000.00.

WHEREFORE, plaintiff Seville demands judgment:

1. As to the First Count against defendants Southmost, Tri-State, Gellman and Alfieri, jointly and severally, in the amount of $2,277,116.00, its attorneys fees plus interest in an amount to be determined at trial, and its costs herein.

2. As to the Second Count against defendants Southmost, Tri-State, Gellman and Alfieri, jointly and severally, in the amount of $759,039.00 plus interest and profits in an amount to be determined at trial, and its costs herein.

3. As to the Third Count against defendants Southmost, Tri-State, Gellman and Alfieri, jointly and severally, in the amount of $759,039.00 plus interest and profits in an amount to be determined at trial, and its costs herein.

4. As to the Fourth Count against defendants Southmost, Tri-State, Gellman and Alfieri, jointly, severally, in the amount of $759,039.00 plus interest and profits in an amount to be determined at trial, and its costs herein.

5. As to the Fifth Count against defendants Southmost, Tri-State, Gellman and Alfieri, each, in the amount of $1,000,000.00.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury as to all issues.

WILENTZ, GOLDMAN
& SPITZER
A Professional Corporation
Attorneys for Plaintiff

By: Alan M. Darnell
ALAN M. DARNELL
For the Firm

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §§1961-1968 (1982)

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property) sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds),

Racketeer Influenced and Corrupt Organizations Act, 18, U.S.C. §§1961-1968 (1982)

or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

Racketeer Influenced and Corrupt Organizations Act, 18, U.S.C. §§1961-1968 (1982)

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds

of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Racketeer Influenced and Corrupt Organizations Act, 18, U.S.C. §§1961-1968 (1982)

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with

the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover

threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

Racketeer Influenced and Corrupt Organizations Act, 18, U.S.C. §§1961-1968 (1982)

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal

proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in

aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian

designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical posession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by an individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall

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return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigatin for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of theUnited States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such

court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-879

IN THE

Supreme Court of the United States

October Term, 1984

SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., and NORMAN GELLMAN individually and doing business as SOUTHMOST MACHINERY CORP.,

Petitioners,

against

SEVILLE INDUSTRIAL MACHINERY CORP.,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Dated: December 28, 1984

No. 84-879

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SOUTHMOST MACHINERY CORP., TRI-STATE MACHINERY CORP., and NORMAN GELLMAN individually and doing business as SOUTHMOST MACHINERY CORP.,

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Question Presented

Whether the Court of Appeals' conclusion that respondent Seville's claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq., was pled in a manner consistent with "notice" pleading warrants review by this Court.

Statement of Related Corporations

Seville Industrial Machinery Corp. has no parent, subsidiary, or affiliated corporations.

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Summary of Argument

This proceeding was initiated by petitioners to overturn the decision of Third Circuit which reinstated respondent's complaint.

The Court of Appeals found that the claim under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 (1982), et seq., as pled, was sufficient to put the defendants on notice of claims against it. Application for rehearing en banc was denied.

Petitioners now seek to have this Court exercise its power of supervision, and review an ordinary issue of "notice" pleading.

Petitioners also seek review of this decision on the grounds that it is in

conflict with prior decisions of this Court and other courts. The conflict claimed by petitioners is that the Third Circuit never decided the scope of RICO, racketeering injury requirements and need for prior convictions. (Petitioner's Brief p.5.) Obviously however, because these issues have not been decided, no conflict exists. Petitioners' contention that it does is simply a red-herring. As will be developed, then, no issue of law for review and no special or important consideration warranting the attention of the Court in this case is presented.

Argument

The Court of Appeals found that respondent's RICO claim was sufficiently

pled to put petitioners on notice of claims against it. Towards that end it concluded that Seville identified and properly alleged the existence of four separate enterprises "marshalled against it." The court reversed "the part of the district court's judgment that held to the contrary." Seville Indus. Machinery v. Southmost Machinery, 742 F.2d 786, 790 (3rd Cir. 1984).

Next, the Court of Appeals considered Seville's pleading of "the circumstances of the fraudulent acts that form the alleged pattern of racketeering activity with the particularity required by Rule 9(b)." Ibid. at 791. It ex-

amined Seville's five "exhibits"* which list over 700 individual pieces of machinery. The court said that Seville satisfied Rule 9(b) "by incorporating into the complaint a list identifying with great specificity the pieces of machinery that were the subject of the alleged fraud." Ibid. at 791. The court went on to find that "the complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresenta-

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* Petitioner for reasons all too obvious has omitted those exhibits from its petition. (Petitioner's Brief pp. vii and 40a.) We have lodged a copy of those exhibits with the Clerk of the Court.

tion.* In sum, we conclude that Seville has alleged the fraud-based offenses with sufficient particularity to withstand a motion to dismiss under Rule 9(b)." Ibid. at 791 and n.6.

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* For example, ¶11B describes one of the alleged acts of fraud:

> [Defendants] [r]epresented to Seville that if the industrial machinery listed in Exhibits A and C were shipped on consignment to either Southmost, Tri-State, Gellman or Alfieri, that the industrial machinery would be resold, and that the purchase price paid by Seville for this equipment along with a 50% pro rata share of the profits resulting from resale would be distributed and paid back to Seville.

App. at 5-6.

Finally, the court found that Seville's allegations that petitioners transported by interstate transportation and sold goods fraudulently obtained worth more than $5,000 also sufficient for pleading purposes. The court held that "Seville has properly pleaded that defendants' conduct violated 18 U.S.C. §§2314 and 2315 (1982)" Ibid. at 792. (Footnote omitted).

In reaching these conclusions the Court of Appeals applied well-settled pleading standards established by this Court in Conley v. Gibson, 355 U.S. 41 (1957) and other cases. See, e.g., Cruz v. Beto, 405 U.S. 319 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 1015 (1971) (federal pleading

policies promote disposition of cases on their merits). It did not however make any new law in this area.

Accordingly, it would be but an ordinary and mundane exercise for this Court to review Seville's complaint to assure that it is consistent with prior pleading law. That is not the sort of important consideration warranting this Court's attention. This fact alone warrants denial of the petition and other factors exist.

The Court of Appeals never addressed, let alone decided, any important RICO issues which may now be pending in this Court and other courts. Specifically, it did not address the scope of RICO, racketeering injury requirements

and need for prior convictions. In fact, the only reference by the court to important RICO decisions was in the context of correctly distinguishing pleadings requirements from proof requirements. Ibid. at 789-90, citing United States v. Turkette, 452 U.S. 576 (1981); United States v. Riccobene, 709 F.2d 214 (3rd Cir. 1983), cert. den. sub. nom. Ciancaglini v. United States, 104 S.Ct. 157 (1983). Petitioners also acknowledge this difference. They said "Admittedly, the Turkette and Riccobene courts were in the procedural posture of reviewing criminal RICO convictions, not determining the adequacy of civil pleadings." (Petitioners' Brief p.7.)

Further, on the only substantive RICO issue even mentioned by the Third

Circuit, i.e., "whether a defendant may also be an enterprise," the court expressly declined to rule on that point. It said "we need not decide this question here." Ibid. at 790.

Despite the total absence of any important RICO finding, petitioners state that the decision of Third Circuit conflicts with decisions of this Court and other courts. In short, they interpret no findings on these issues as tantamount to conflicting findings with those of other courts. Petitioner's strained attempt to demonstrate a conflict therefore obviously fails. It is simply a red-herring and illusionary. What they are really attempting to do, all too conspicuously, is bootstrap themselves into

this Court on the heels of Sedima S.P. R.L. v. Imrex Co., Inc., 741 F.2d 482 (2d Cir. 1984) and other cases. This is improper and not a basis for granting certiorari.

Yet still another reason exists for denying the petition. This case is still in the fetal stage of development. It has not progressed beyond the complaint. No answer has been served. Discovery has not been conducted. No factual record exists beyond the allegations in respondent's complaint. It could well turn out that, after discovery, respondent will be able to prove all elements of RICO, whether statutorily mandated or judicially created including prior criminal convictions. Therefore, this case

is not sufficiently developed for review by this Court.

Conclusion

Petitioner has not shouldered its burden of identifying special or important considerations warranting review on certiorari. Ordinary issues of "notice" pleading do not command the attention of this Court. No conflict exists between the decision of the Court of Appeals in this case and decisions of other courts. Thus, the petition for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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Dated: December 28, 1984